SUPREME COURT, U. S.

No. 948

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CITIZENS CASUALTY COMPANY OF NEW YORK,

Petitioner,

v.

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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IN THE

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OCTOBER TERM, 1970

CITIZENS CASUALTY COMPANY OF NEW YORK,

Petitioner,

v.

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, Citizens Casualty Company of New York, prays that a writ of certiorari issue to review the final order of the Court of Appeals for the State of New York entered on July 1, 1970.

Opinions Below

The final order of the Court of Appeals affirmed without opinion the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, filed on March 23, 1970. The order and judgment of the Appellate Division was filed in conformity with its decision and findings dated March 12, 1970. A copy of the order of the Court of Appeals is appended to this petition as Appendix A. A copy of the decision and findings of the Appellate Division is appended to this petition as Appendix B.

Jurisdiction

The order of the Court of Appeals was dated and entered on July 1, 1970. On September 24, 1970, Mr. Justice Harlan granted petitioner an extension of time until November 9, 1970 to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented

Whether the Appellate Division's findings and decision, as affirmed by the Court of Appeals, resulted in an unconstitutional taking of petitioner's property, where the Appellate Courts ignored the proof of petitioner's solvency as of the time of a constitutionally mandated "full hearing".

Constitutional Provision

Article XIV, Section 1 of the United States Constitution provides in pertinent part that:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

In April, 1968 the respondent, as Superintendent of Insurance, petitioned the Supreme Court of the State of New York for an order, pursuant to Article XVI of the New York Insurance Law, to rehabilitate the petitioner because of its alleged insolvency.* After a summary

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*Unless otherwise indicated, reference to any statute or Article is to the New York Insurance Law contained in Vol. 27, McKinney's Consolidated Laws of New York.

proceeding, the Supreme Court granted the respondent's petition, which decision was affirmed by the Appellate Division, First Department. The Court of Appeals reversed and remanded for further proceedings, holding that the petitioner had not been afforded a "full hearing" on the issue of its solvency, in accordance with due process and Section 326 of the Insurance Law.*

In December 1969, the trial court dismissed the respondent's petition holding that he had failed to establish his entitlement to the relief sought. The Appellate Division reversed on the law and facts and entered an order and judgment granting the respondent's petition, which order and judgment was affirmed without opinion by the Court of Appeals.**

In the *Second Stewart Appeal*, the Appellate Division found that the petitioner was insolvent as of December 31, 1967 and 1968, but ignored the petitioner's proof of its solvency as of the constitutionally mandated "full hearing".

The petitioner has been in business for more than forty years, was licensed in forty-seven states, had assets of approximately $15,000,000 in 1968, and premium income of $11,000,000 for the same year. Even though the petitioner had no premium income after April 1968, on account of this litigation, it continued to pay all proper claims in due course until March 1970, when it was restrained from doing so by the Appellate Division. At the trial in November 1969, the petitioner demonstrated by testimony and documentary evidence that between December 1968 and September 1969 it had tried, settled and

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* *Matter of Stewart (Citizens Cas. Co. of N. Y.)*, 23 N. Y. 2d 467, 244 N. E. 2d 690, 297 N.Y.S. 2d 115 (1968) (cited hereafter as the *First Stewart Appeal*).

** *Stewart* v. *Citizens Casualty Company of New York*, 27 N. Y. 2d 685, 262 N. E. 2d 215, 314 N.Y.S. 2d 7 (1970), *affirming* 34 A. D. 2d 525, 308 N.Y.S. 2d 513 (1st Dep't 1970) (cited hereafter as the *Second Stewart Appeal*).

disposed of thousands of cases, thereby greatly decreasing the amount of reserves necessary under the law. In addition, the petitioner proved that, on the basis of the actual disposition of thousands of claims during 1969, the reserves demanded by the respondent were about $2,500,000 *more* than the claims were actually settled for, and that the amounts actually paid out in 1969 were several hundred thousand dollars *less* than the petitioner's own reserves.

The Appellate Division ignored the petitioner's proof of its solvency. Consequently, the constitutional issue first arose upon the decision and findings of that Court on March 12, 1970. The issue was raised before the Court of Appeals in the petitioner's brief and argument.

Reasons for Granting the Writ

On the *First Stewart Appeal*, the Court of Appeals held that Section 526 and due process require a "full hearing", having "reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts", *before* the making of an order of rehabilitation.* The Court rejected the respondent's argument that Section 526 and due process were satisfied because the petitioner, pursuant to Section 512(3), was entitled to a "full hearing" in a termination proceeding *after* the entry of a rehabilitation order.**

The Appellate Division in its decision and findings in the *Second Stewart Appeal* failed to consider the condition of the petitioner *at* the time of the mandated "full hearing."

Thus, the Appellate Division ignored the petitioner's proof that the respondent's demand for reserves for 1969

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* *Matter of Stewart* (*Citizens Cas. Co.*), *supra* at 414, 244 N. E. 2d at 693, 297 N.Y.S. 2d at 120.

** *Id.* at 418, 244 N. E. 2d at 696, 297 N.Y.S. 2d at 124.

was $2,500,000 *more* than the amount the claims were actually settled for, and ignored the petitioner's proof of its actual condition as of September 1969. The Appellate Division, by limiting its determination to the period ending December 31, 1968, conducted its own summary proceeding denying the petitioner the "full hearing" ordered on the *First Stewart Appeal* and mandated by due process. *Morgan* v. *United States*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

In a rehabilitation proceeding, which is an equitable form of action, the New York Appellate Courts were bound "to consider the history of the [petitioner] subsequent to the filing" of the petition for rehabilitation. *Equitable Life Assurance Soc.* v. *Brown*, 213 U. S. 25, 41-42 (1909). The reasons for such a consideration were stated by Mr. Justice Peckham as follows:

> "[I]t is yet proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant. The corporation is one of the largest in the world with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus, reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking towards its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty . . . [I]t has happened that since 1905 a new board of directors has been chosen, new officers placed in command and probably an entirely new policy adopted and followed. Although these last-mentioned facts have happened since the filing of the bill in 1905, nevertheless it is

not improper to refer to them, as they only constitute a history of the defendant since that time. They are found in public documents in New York, filed and existing of record in its insurance department, and they are the sworn returns of the officers of the defendant made since the change in 1906. They may be referred to, not to contradict the averments of the bill, but to show the officers now in control of the management of the defendant, its present condition, and the fact that it is now in full operation and in the daily discharge of all its obligations as they are presented. The right to an accounting in equity and the winding up of the defendant under these circumstances would have to be most clearly made out before such relief would be granted. A court of equity is bound to consider these facts before it would grant relief of the nature demanded.'"*

By ignoring the petitioner's proof of its solvency as of the date of the constitutionally mandated "full hearing", the New York Appellate Courts have denied the petitioner and its thousands of policyholders due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

November 6, 1970.

Respectfully submitted,

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---

* *Ibid.*

Appendix A.

Court of Appeals

STATE OF NEW YORK

July 1, 1970

Appeal from Supreme Court

Appellate Division—First Department

Richard E. Stewart, as Superintendent of Insurance of the State of New York,

Respondent,

v.

Citizens Casualty Company of New York,

Appellant,

and

Coordinated Coverage Corp., et al.,

Intervenors.

Order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is, affirmed, without costs.

All concur.

Appendix B.

Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

March 12, 1970

Appeal from Supreme Court
Trial Term, New York County

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Petitioner-Appellant,

v.

CITIZENS CASUALTY COMPANY,

Respondent-Respondent,

and

COORDINATED COVERAGE CORP., et al.,

Intervenors.

PER CURIAM.

Judgment, entered January 5, 1970, dismissing the petition in a proceeding pursuant to section 511 of the Insurance Law for an order of rehabilitation of the respondent on the ground of insolvency, unanimously reversed, on the facts and on the law, without costs and without disbursements, and the relief sought in the petition granted.

The petition of the Superintendent of Insurance to take over and rehabilitate the respondent Citizens Casualty Company of New York upon the ground of its insolvency

as of December 31, 1967, was initiated in April 1968. This court in July 1968 affirmed an order of the Supreme Court directing the Superintendent to take possession of Citizens, one Justice dissenting and voting to remand on the ground that the respondent had been denied a full hearing. (Mtr. of Stewart v. Citizens Cas. Co., 30 A. D. 2d 293, 291 N.Y.S. 2d 465.)

In December 1968 the order of affirmance of the Appellate Division was reversed by the Court of Appeals (three Judges dissenting) and the case was remanded to give the insurer an opportunity upon a full hearing to present its evidence of solvency. (Mtr. of Stewart v. Citizens Cas. Co., 23 N. Y. 2d 407, 297 N.Y.S. 2d 115, 244 N. E. 2d 690.) Prior to the retrial under review, the respondent insurer amended its answer to plead affirmative defenses of solvency as of December 31, 1968 and as of August 31, 1969.

The retrial took some twelve days in November and December 1969. The respondent insurer did not dispute the findings of the petitioner's examiners concerning the assets of the respondent as of December 31, 1967 and December 31, 1968. Nor was there dispute with respect to the liabilities of the respondent other than the adequacy of reserves required to be maintained as of those dates. Further limiting the area of controversy, the adequacy of the reserves was contested solely with reference to the reserves required for unknown losses (Insurance Law, § 326(2) (b)). Reserves for unknown losses are bulk reserves established on an "in perpetuity" basis. They are made up of "A & R" ("additional and reopened") claims and "IBNR" ("incurred but not reported") claims. The only evidence adduced by the respondent with respect to the "in perpetuity" reserves was that of an independent expert certified public accountant who testified with reference to the data supplied to him by the respondent. The report of this expert, admitted in evidence over objection, bore the following preface: "We did not make an audit in accordance with generally accepted auditing standards

and accordingly can express no opinion as to the amount of the A & R and IBNR provisions for loss and loss expense calculated by us, losses developed by Citizens or the validity of the data used in our calculations." Nevertheless, even if petitioner's figures for the "in perpetuity" reserve be reduced to those as testified to by this expert, the respondent would still be insolvent as of December 31, 1968 by a sum in excess of three million dollars.

Following the remittitur by the Court of Appeals, the respondent neglected to have a complete audit made of its records of account as of any particular date. The status of its business as one having an excess of assets over required reserves and other liabilities, was never established. It failed to prove its defense of solvency as of December 31, 1968, or as of any other date subsequent thereto.

We find upon the evidence adduced at this full hearing that:

1. The respondent was insolvent as of December 31, 1967 in the minimum amount of $4,490,808.82 within the meaning of section 93, Insurance Law.

2. The respondent was insolvent as of December 31, 1968 in the minimum amount of $5,269,693.46 within the meaning of section 93, Insurance Law.

3. The respondent failed to prove its own solvency at any time.

4. The respondent failed to repair capital impairment despite lawful demands made therefor by the petitioner pursuant to section 94, Insurance Law, and consequently is liable to rehabilitation on the grounds stated in that section and section 511(c) and (e) of the Insurance Law.

5. The petitioner is entitled to a judgment for the rehabilitation of the respondent upon the grounds stated in sections 93, 94 and 511(a), (c) and (e) of the Insurance Law.

Settle judgment on notice.

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OCTOBER TERM, 1970

No. 948

CITIZENS CASUALTY COMPANY OF NEW YORK,
Petitioner,

against

RICHARD E. STEWART, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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CITIZENS CASUALTY COMPANY OF NEW YORK,

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against

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF IN OPPOSITION

Opinions Below

The affirming order, without opinion, of the Court of Appeals of New York State is reported at 27 N Y 2d 685, 262 N E 2d 215, 314 NYS 2d 7 (1970). It is contained in Appendix A, page 7 of the petition herein. The opinion of the Appellate Division, First Department of the New York Supreme Court is reported at 34 A. D. 2d 525, case 4, 303 NYS 2d 513 (1st Dept. 1970). It is contained in Appendix B, pages 8 through 10 of the petition herein. The final order and judgment of the Appellate Division,

affirmed as aforesaid, is contained in Appendix II herein. Application by petitioner for a stay of the judgment of the state courts was presented to Justice John M. Harlan and denied on August 10, 1970.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court by way of certiorari pursuant to 28 U.S.C. § 1257(3). Respondent contends the petition is not merely legally insufficient to maintain jurisdiction, but the claim thereto is based upon an erroneous factual predicate as demonstrated on the close of the Statement of the Case, *infra*, page 89.

Counterstatement of Questions Presented

1. Where the express findings and conclusions of the state courts establish conclusively that evidence offered by petitioner as to solvency and received was considered, is it possible to create a federal question simply because petitioner disagrees with the result arrived at by the state courts?

2. Where the disposition by the state courts expressly included two other bases provided for under state law for the rehabilitation of the insurance company directed by the state courts, is the illusory claim by petitioner of error in the finding of insolvency maintainable as a reason for the application for the writ of certiorari?

Relevant Statutes and Parts Thereof Involved

Insurance Law of the State of New York (McKinney's Consolidated Laws of New York, Vol. 27)

§ 93. "Insolvency of an insurer.—Whenever the superintendent finds . . . from a report on examination

of any such insurer, that such insurer is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as may be shown either by an excess of its required reserves and other liabilities over its admitted assets, . . . such insurer shall be deemed insolvent and he may proceed against it under the provisions of article sixteen, . . ."

§ 94. "Impairment of capital of a stock insurer.—Whenever the superintendent finds from a financial statement . . . from a report on examination of any such insurer that its admitted assets are less than the aggregate amount of its liabilities and outstanding capital stock, he shall determine the amount of such impairment of capital and issue a written requisition to the corporation to eliminate such impairment within such period as he shall designate. . . . If the amount of the impairment so determined is equal to or more than twenty-five per centum of its outstanding capital stock, or is such that it does not have the minimum capital required by the provisions of this chapter, and if at the expiration of such designated period, such insurer has not satisfied the superintendent that such impairment has been eliminated, the superintendent may proceed against such insurer under the provisions of article sixteen on the ground that its condition is such that its further transaction of business will be hazardous to its policyholders or its creditors or the public. . . ."

§ 511. "Grounds for rehabilitation of domestic insurer—The superintendent may apply under this article for an order directing him to rehabilitate a domestic insurer upon any one or more of the following grounds: that such insurer (a) is insolvent within

the meaning of section ninety-three; . . . (e) has failed or refused to comply within the time designated by the superintendent, with an order of the superintendent pursuant to law, to make good an impairment of its capital . . . (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public;

§ 526. "Commencement of a proceeding—The superintendent, the attorney-general representing him, shall commence any proceeding under this Article by an application to the supreme court, or to any justice thereof, in the judicial district in which the principal office of the insurer involved is located, for an order directing such insurer to show cause why the superintendent should not have the relief prayed for on the return of such order to show cause, and after a full hearing, which shall be held by the court or justice without delay, such court or justice shall either deny the application or grant the same together with such relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, or the public may require."

Statement of the Case

On April 29, 1968, Richard E. Stewart, as Superintendent of Insurance of the State of New York, instituted a proceeding in the Supreme Court of the State of New York, New York County, seeking an order to take over and rehabilitate the Citizens' Casualty Company, an insurer chartered under the laws of the State of New York, on three grounds:

a) that the said insurer was insolvent within the meaning of § 93 of the Insurance Law of the State of New

York*, i.e., a report of examination by State examiners showed its required reserves and other liabilities exceeded its admitted assets.

b) that it had failed to make good an existing capital impairment after due demand by the said Stewart, pursuant to the provisions of § 94 of the Insurance Law of the State of New York; and

c) that the continued transaction of business by this insurer would be hazardous to the public, and to its policyholders and creditors.

Rehabilitation is the equivalent of a temporary receiver *In re Lawyers Mortgage & Trust Co.*, 284 N. Y. 371 (1940) and may be followed by a separate application to the court for liquidation if the "superintendent shall deem that further efforts to rehabilitate such insurer would be futile" (§ 512 subd. 2).

The proceeding was brought pursuant to the provisions of Article XVI of the New York Insurance Law, § 511 of which authorizes these three grounds [§ 511(a), (c) and (e)]. The charge of insolvency was based upon a report of examination made as of December 31, 1967. The petition also alleged that the insurer failed to respond in any way to written demands made by Stewart dated April 23, 1969 to make good the capital impairment of $4,096,000, also found as the result of examination.

The answer of the insurer constituted a general denial, and an affirmative defense of solvency. No constitutional issue was raised by the pleadings at this stage, either state or federal.

The trial on these pleadings resulted in a judgment for petitioner on May 20, 1968. Upon ultimate appeal to the highest Court of this State, in January, 1969 it was reversed and remanded for a new trial upon the specific

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* Volume 27, McKinney's Consolidated Laws of New York.

ground that the statutory requirement of a "full hearing" (§ 526 of the Insurance Law) mandated an opportunity for the insurer to present counter proof of its solvency [*Matter of Stewart*, 23 N. Y. 407, 244 N. E. 2d 690, 207 N.Y.S. 2d 115 (1968)]. The trial Court had dismissed the insurer's offer of proof as immaterial.

Subsequent to this reversal, the Superintendent with notice to the insurer again caused an examination of the affairs of this insurer as of December 31, 1968. It was commenced in May, 1969 and was completed August 29, 1969. The finding was of an even greater insolvency; and in May, 1969, again demanded capital impairment be made good, meeting with a direct refusal.

Before the new trial was commenced, however, the insurer, upon leave granted, filed an amended answer, constituting a general denial and affirmatively alleging its solvency as of December, 1968 and as of August 29, 1969. The petition was not amended; it alleged insolvency as of December, 1967 and the other two grounds above recited. No question of constitutional or other invalidity of any state statute was raised by these subsequent pleadings.

The second trial took place in November and December, 1969. Petitioner introduced its evidence of the insurer's insolvency as of both December 31, 1967 and December 31, 1968; and that the written demands to make good capital impairment were made by Stewart in April, 1968 and May, 1969 and were not met.

The insurer's proof consisted in the presentation by four witnesses of an amazingly fragmentized and unconnected series of statistics. None of the insurer's witnesses either testified the insurer was solvent at any time or produced any document to prove that proposition.

The trial Court dismissed the petition and Superintendent appealed to the Appellate Division. (Appendix I annexed hereto is a brief description of the nature of the

proof offered by the insurer (referred to therein as "respondent"); and constituted Point II of the Superintendent's brief to that Court in urging reversal.) The Appellate Division unanimously reversed the trial Court on the law and the facts, and made new findings of facts. [See Appendix B, annexed to the Petition, *Stewart* v. *Citizens Casualty Company of New York*, 34 A. D. 2d 525, 308 N.Y.S. 2d 513 (1st Dept., 1970).] The final order and judgment entered by the Appellate Division on that decision is annexed hereto as Appendix II. This is basically the judgment challenged here.

Findings of fact numbered 1, 2 and 3 in that opinion and the order bear heavily on the legal and factual error in the petition herein. The insurer appealed to the Court of Appeals from the final order and judgment of the Appellate Division, but it was affirmed unanimously. [27 N. Y. 2d 685, 262 N. E. 2d 215, 314 N.Y.S. 2d 7.] Significantly, in the Superintendent's brief to the Court of Appeals appears the following report of colloquy between insurer's counsel and the judges of the Appellate Division, which remained unchallenged in the insurer's reply brief to the Court of Appeals:

> "Yet at the oral argument before the Appellate Division, counsel for respondent, when asked by Justice Nunez why the respondent did not have a complete audit made between the date of the remittitur from this Court (January, 1969) and the date of the trial (November 14, 1969), lamely replied there was not enough time; and when asked by Justice Capozzoli why he did not ask for an adjournment of the trial for this reason, counsel said an audit would take two years."

The insurer now comes to this Court to present this question:

> "Whether the Appellate Division's findings and decision, as affirmed by the Court of Appeals, resulted

in an unconstitutional taking of petitioner's property, where the Appellate Courts ignored the proof of petitioner's solvency as of the time of a constitutionally mandated 'full hearing'."

The factual predicate in this question is completely erroneous and untenable. The Appellate Division did not ignore the proof offered by the insurer in support of its claim of solvency at the time of the hearing. The opinion of the Appellate Division contains these findings (Appendix B, annexed to Petition, p. 10):

> "Following the remittitur by the Court of Appeals, the respondent neglected to have a complete audit made of its records of account as of any particular date. The status of its business as one having an excess of assets over required reserves and other liabilities, was never established. It failed to prove its defense of solvency as of December 31, 1968, or as of any other date subsequent thereto."

and three of the formal findings read (Id.):

> "We find upon the evidence adduced at this full hearing that:
>
> 1. The respondent was insolvent as of December 31, 1967 in the minimum amount of $4,490,808.82 within the meaning of section 93, Insurance Law.
>
> 2. The respondent was insolvent as of December 31, 1968 in the minimum amount of $5,269,693.45 within the meaning of section 93, Insurance Law.
>
> 3. The respondent failed to prove its own solvency at any time."

Moreover, the fourth decretal paragraph of the final order and judgment of the Appellate Division (Appendix II annexed hereto, p. 23) reads:

> "ORDERED AND ADJUDGED that the respondent Citizens Casualty Company of New York be and it is declared to be insolvent, and it is further"

It is therefore abundantly clear that the Appellate Division did not ignore the proof proffered by the insurer in support of its claim of insolvency but on the other hand not only rejected it as insufficient to establish solvency at the time of the hearing or at any time subsequent to December 31, 1968, but also adjudged the insurer to be insolvent at the conclusion of the trial (December, 1969).

Finally, the fundament upon which the insurer bases its "Reasons for granting the Writ" contains no statement of affirmative proof of *solvency* offered by the insurer at the trial. (See paragraph beginning at the bottom of page 4 of the Petition and carrying over on page 5.) Even if accepted as true, the allegations of proof that "the respondent's (Superintendent's) demand for reserves for 1969 was $2,500,000 *more* than the amount of claims were actually settled for" does not and, in the context of this case, could not, determine solvency. This paragraph then goes on to charge the Appellate Division with ignoring the insurer's "proof of its actual condition as of September 1969", in the face of the explicit finding by the Appellate Division that, following the remittitur by the Court of Appeals in January 1969,

> "The status of its business as one having an excess of assets over required reserves and other liabilities, was never established."

As recited in the petition, the first attempt by the insurer to raise the constitutional question of lack of due process was in the brief to the Court of Appeals following the findings newly made by the Appellate Division. The Court of Appeals, in affirming, did not write an opinion and thus *sub silentio* unanimously affirmed the findings and conclusions of the Appellate Division.

Reasons Why the Petition for Certiorari Should Be Denied

The two principal reasons why the petition fails to show any warrant for review by this Court on certiorari are:

1. No federal question is presented.

2. The decision and judgment sought to be reviewed are alternatively supported on adequate non-federal grounds.

I

There is no federal question presented here.

As a result of the insurer's appeal (23 N. Y. 2d 407, 244 N. E. 2d 690, 297 N.Y.S. 2d 115 [1968]), the case in January, 1969, was remanded for a new trial, specifically for the purpose of permitting the insurer to present evidence of its solvency. That the Appellate Division did not ignore *any* of the evidence presented by the insured at the second trial is perfectly clear, first, from its incisive analysis of the evidence of the insured's condition up to December 31, 1968, and secondly by its deliberate findings that not only had the insurer

> "failed to prove its defense of solvency as of December 31, 1968, or as of any other date subsequent thereto"

but also that

> ". . . the status of its business as one having an excess of assets over required reserves and other liabilities was never established." (See Appendix B, annexed to petition, page 10; *Matter of Stewart* [*Citizens Cas. Co. of N. Y.*], 34 A. D. 2d 525, 308 N.Y.S. 2d 513.)

The Appellate Division did not ignore the insurer's evidence. On the contrary, the evidence was carefully considered by that Court and rejected as insufficient. The final judgment of that Court, speaking as of the time of the trial, adjudged the insurer insolvent then.

Since there is no factual predicate for the claimed deprivation of due process, there can be no substantial federal question and the petition should be denied on that ground alone.*

II

The decision and judgment below are alternatively supported on independent state grounds.

Findings numbered 4 and 5 in the Appellate Division decision and judgment (see Appendix B annexed to the petition, p. 10), i.e. the insurer failed to make good a capital impairment upon proper demand, and is in such a condition as to make further transaction of business by this insurer hazardous to the public and to its creditors and policyholders are not attacked in any manner in the petition. These are independent state grounds upon which the challenged decision and judgment are founded.** These

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* *Equitable, etc.* v. *Brown*, 213 U. S. 25, quoted from by petitioner (Br., p. 5) was an appeal from a disposition which originated in the District Court and did not involve any attempt to review a state court decision upon alleged constitutional grounds. The state courts in the instant case, as the record shows, conscientiously took all the evidence in consideration.

** The whole illusionary character of the review sought by petitioner is emphasized by the fact that, in accordance with the Superintendents' petition in the state court, the state courts found, as we have pointed out, that the continued transaction of business by the insurer would be hazardous to the public and to its policy holders and creditors (§ 511, sub. e), the basis upon which liquidation was upheld in *Matter of People* (International Workers Order), 305 N. Y. 258, —— N. E. 2d ——, cert. den. 346 U. S. 857, reh. den.

(*footnote continued on following page*)

findings of the Appellate Division, affirmed by the Court of Appeals (as is also the case with the first three findings concerning insolvency and the failure of the insurer to establish solvency) are the unanimous concurrent findings of two appellate courts.

Since the challenged decision and judgment are supportable upon independent state grounds, not even referred to in the petition and not here reviewable by this Court, the application is not maintainable here. *Herb* **v.** *Pitcairn*, 324 U. S. 117, 125, 126; *Wilson* v. *Loews Inc.*, 355 U. S. 597.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be in all respects denied.

Dated: New York, N. Y. December 8, 1970.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondent
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Samuel A. Hirshowitz
First Assistant Attorney General

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Assistant Attorney General

(footnote continued from previous page)

346 U. S. 913. The *Equitable Life* case, relied upon by petitioner (Br., p. 5) was unsuccessfully cited in *Matter of People.* In the *Equitable* case, the court pointed out (213 U. S. at 42) that "The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant . . . . There is no such [federal] question here."

APPENDIX I

POINT II

Respondent's proof was incompetent.

The respondent offered no proof as to what the financial condition of the respondent was as of December 31, 1967. No witness of the respondent testified to the solvency or insolvency of the respondent as of December 31, 1967. The testimony of two witnesses touched on reserves established for certain claims open on December 31, 1967 but not for all, nor for any representative sample of the claims open on that date; nor was their testimony restricted to the reserves set on that date but only those carried at the cut-off date of their later respective reviews.

Claim reserves are constantly changing to reflect partial payments, which reduce remainder reserves, or increased liability or damage pictures which increase reserves, or should. For Woods, there were two cut-off dates, July 31 and August 31, 1969, for Altschul September 30, 1969, for Cusworth September 30, 1969 and for McGettigan, December 15, 1969. As Woods said, no comparison of figures could be made, "you'd be comparing apples to peaches, really" (T.M. 570).

The only way to prove the condition of the company at any time after December 31, 1967 was by a statement of condition as of any single cut-off date thereafter made by a person proved qualified to do so, i.e., an accountant's "balance sheet". The authority on such financial statements is *Financial Statements* by *Kennedy and McMullen* and the fourth edition (1962) is today the leading textbook on the subject. On page 4, it says:

> "The balance sheet, which reveals the financial position or status of a business as reflected by the accounting records, contains a list of asset, liability, and

> owner's equity items as of *the close of business on a particular date.* A balance sheet is defined by the Committee on Terminology of the American Institute of Certified Public Accountants as 'a tabular statement or summary of balances' (debit and credit) carried forward *after an actual or constructive closing of books of account* kept according to principles of accounting." (Emphasis supplied.)

(See, also, *American Institute of Certified Public Accountants, Accounting Terminology Bulletin No. 1,* Review and Resumé, p. 12.)

The amazing thing about the submission of respondent's proof is its complete fragmentation. The respondent had plenty of time since January, 1969, when the Court of Appeals remitted the case for a new trial, to have a complete audit made as of either December 31, 1967 or December 31, 1968 or as of any other date subsequent thereto. Moreover, it did engage a firm of recognized independent experts, certified public accountants Lybrand, Ross Bros. and Montgomery, experienced in insurance company audits (T.M. 644, 647, 650). Yet this firm's review was limited to in perpetuity future reserves for additional and reopened cases and reserves for incurred but not reported losses and concomitant loss expenses, and to make a calculation of the unpaid losses as of September 30, 1969 (T.M. 648). The accountants did not, "for auditing purposes, or for the purpose of making this report (Resp. Exh. I and J), examine any of the claims to verify the data given to" them "by the company". Although Mr. Cusworth was most reluctant to do so (T.M. 673 to 680), he finally had to admit the following on cross-examination:

> "Q. Isn't it true that every figure you have got in here (Respondent's Exhibits I and J) is based upon data given to you by the company? A. By the Company or Mr. Baltimore, copies of examination work papers and Mr. Rosenberg's memorandum of

May 7, 1969, which we worked with in compiling this." (T.M. 680)

In other words this was *not* an audit of the company's records of account. It was a report built up out of data spoon-fed to the accountants by the respondent or its trial counsel. It is therefore clear why both Respondent's Exhibits I and J, the only reports from the Lybrand firm offered in evidence by respondent, each state that the procedures used by Lybrand's auditors were not *in accordance with generally accepted principles of accounting.* Not only was the verification work left undone but they were assigned only a small part of an incohesive job.

It can safely be inferred that having had the time, and the engaged experts, any complete report based upon generally accepted principles of accounting, would have been unfavorable to the respondent. And it can safely be also inferred that the reason for the termination of the 1966 examination by this same firm was the tentative conclusion of insolvency referred to, *supra*, p. 18.

Not an auditor but an independent adjuster (T.M. 456), witness Woods was given another piece of the action, that is, to review the claim files (T.M. 457, 460, 532). He had previously reviewed claim files for this respondent, while in the employ of another reinsurer and found the reserves inadequate (T.M. 485). He testified that in August, 1969, his company (adjusters) were hired to review claims for reserve sufficiency (T.M. 498), that he, too, picked the claims from *information provided by the Company*, i.e., statistical computer runs of outstanding claims (T.M. 497), for the four lines he examined (Ocean Marine, Other Liability, Automobile Bodily Injury and Workmen's Compensation [T.M. 494-496]).

But these runs *only showed 2403 outstanding claims.* They did not include automobile property damage ("Didn't look at it, sir" T.M. 496) which amounted to 4120 claims

as of December 31, 1968 (T.M. 512) out of a total of 9548 open at that date (T.M. 512). Of the 2403 claims shown on the statistical run, Woods claimed to review 1556 (T.M. 496) and his reports contain some high percentage samples, such as 91.6% of outstanding run for other liability; 86%, Auto Liability (P.I.), 87% Workmen's Compensation (T.M. 494, 496). *But these are percentages of the outstanding runs furnished by the respondent* and containing only 2403 claims, which he never checked, merely assumed to be accurate (T.M. 532, 533, 535). Moreover, Woods did not examine *any* of the claims of the respondent handled by Coordinated Coverage which constituted a "good segment" of 3000 claims not on the statistical runs (T.M. 514).

Woods further testified he did not examine the claim files to determine reserves with a cut off date of December 31, 1968 and did not check the company's reserves for claims for all categories as they existed on a cut off date for December 31, 1968 (T.M. 531). When asked if there was any record anywhere in his examination which compared his findings with the figures shown on page 10 of Petitioner's Exhibit 2 (the Insurance examiners' report of outstanding claims and reserves as of December 31, 1968, he replied (T.M. 570):

> "No. As I explained to you, I worked on current outstanding. This is as of December, 11 months ago, 1968. I worked as of August, 1969, so a percentage of cases I reviewed, as I mentioned before, were outstanding as of December, 1968, but you could not compare these figures. *You'd be comparing apples to peaches*, really."

He also admitted, as respondent's expert, that the smaller claims are disposed of faster in all categories except Workmen's Compensation (T.M. 571, 572) and "they should turn over faster if there is somebody working on them" (T.M. 574).

Needless to say, Woods also testified he did not check the assets or other liabilities of the company, and was not instructed to determine whether or not Citizens Casualty Company was a solvent corporation (T.M. 532). And the reserves set by Woods are not supported by analysis data in evidence except for 58 claims (Pet. Exh. 61; marked for identification). His review and determinations cannot stand up to the carefully anayzed and detailed findings of the insurance examiners.

Altchul, an executive with a major financial interest in respondent, but not an accountant, testified as to development runs, i.e., runs of payments made on claims which had reserves. But his testimony suffers from the same defect as Woods'. His cut off date was September 30, 1969, different from Woods' two cut off dates July 31, 1969 and August 31, 1969. No one can tell from his reports what the company's loss and loss expense reserves should be either as of September 30, 1969 or as of any date.

McGettigan's testimony was a glib farce. The claim vouchers he used to support his figure of 1269 claims closed with payment, in the only instance checked, showed that it was not settled for the amount of the draft $1500, but for $1900 (T.M. 917) and the reserve on it, set by Coordinated for the respondent, was $250 (T.M. 901), a major underreserving. Moreover, of the 1400 claims closed without payment, *796 were so closed during the first two weeks of December, 1969, while the trial was in progress.* Then he tried to support the reserves set by Coordinated for the company on the basis of dollar averaging the number of claims paid (T.M. 943, 945), even though Woods testified the smaller ones are disposed of first.

These are the only four witnesses who testified as to the liabilities of the respondent. None testified as to assets at the time of their cut off dates, assets which as heretofore shown dropped $3,000,000 between December

31, 1968 and June 30, 1969 and $4,000,000 between December 31, 1968 and September 30, 1969 (Pet. Exh. 13, June, 1969 quarterly statement and Pet. Exh. 29).

Respondent's entire proof is nothing more than a hodge podge of unconnected statistics proving nothing. Not one witness claimed the respondent was solvent. Not one document in any way showed that. It was all incompetent to prove solvency.

APPENDIX II

Order and Judgment of Reversal.

Index No. 40810/68

No. 1676
FILED
MAR 23 1970

Appellate Division, Supreme Court
First Department

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 23rd day of March, 1970,

Present: HON. LOUIS J. CAPOZZOLI, Presiding Justice
HON. OWEN MCGIVERN
HON. EMILIO NUNEZ
HON. JAMES B. M. MCNALLY
HON. GEORGE TILZER,
Justices.

In the Matter of the Application of RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Petitioner-Appellant,

For an Order to Take Possession of the Property and Rehabilitate

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent-Respondent,

COORDINATED COVERAGE CORP., LEASING COVERAGE CORP. and TRANSIT COVERAGE CORP.,
Intervenors.

The petitioner Richard E. Stewart, as Superintendent of Insurance of the State of New York, above named in

this proceeding, having appealed to the Supreme Court of the State of New York, Appellate Division, First Department, from a judgment of the Supreme Court, herein entered in the office of the Clerk of New York County, on the 5th day of January, 1970, in favor of the respondent Citizens Casualty Company of New York and dismissing the petition herein and the said appeal having been argued by Mark T. Walsh, Assistant Attorney General, of counsel for petitioner-appellant and argued by Richard L. Baltimore, Jr., Esq., of counsel for the respondent-respondent and due deliberation having been had thereon and upon the memorandum of decision of this Court filed herein on March 12, 1970 and made a part hereof, which reversed the said judgment so appealed from, on the facts and on the law, without costs and without disbursements, and granted the relief sought in the petition and the said decision having reversed all the findings of fact in the opinion of the Hon. Adolph C. Orlando, a Justice of the Supreme Court, sitting in Trial Term Part IX, New York County, dated December 31, 1969 insofar as they are or may be inconsistent with said decision, and the petitioner's proposed findings numbered 1 to 5 having been allowed and found upon the evidence adduced at the full hearing as follows:

1. The respondent was insolvent as of December 31, 1967 in the minimum amount of $4,490,808.82 within the meaning of section 93, Insurance Law.

2. The respondent was insolvent as of December 31, 1968 in the minimum amount of $5,269,693.46 within the meaning of section 93, Insurance Law.

3. The respondent failed to prove its own solvency at any time.

4. The respondent failed to repair capital impairment despite lawful demands made therefor by the petitioner pursuant to section 94, Insurance Law, and consequently is liable to rehabilitation on the grounds stated in that section and section 511(c) and (e) of the Insurance Law.

5. The petitioner is entitled to a judgment for the rehabilitation of the respondent upon the grounds stated in sections 93, 94 and 511(a), (c) and (e) of the Insurance Law.

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the petitioner herein, it is hereby unanimously

ORDERED AND ADJUDGED that the judgment so appealed from be and the same hereby is reversed on the law and on the facts, without costs or disbursements, and the petition of Richard E. Stewart, Superintendent of Insurance for the State of New York, for an order of rehabilitation pursuant to Article XVI of the Insurance Law be and the same is in every respect granted, without costs and without disbursements, and it is further

ORDERED AND ADJUDGED that all of the findings contained in the opinion of the Hon. Adolph C. Orlando, the Justice of the Supreme Court of the State of New York, sitting at Trial Term Part IX, New York County, dated December 31, 1969 and on that day filed herein in the office of the Clerk of New York County, insofar as they are or may be inconsistent with the findings set forth below, be and they hereby are reversed, disapproved and disallowed; and it is further

ORDERED AND ADJUDGED that the petitioner's proposed findings numbered 1 to 5, be and they hereby are found and allowed as follows:

1. The respondent was insovent as of December 31, 1967 in the minimum amount of $4,490,808.82 within the meaning of section 93, Insurance Law.

2. The respondent was insolvent as of December 31, 1968 in the minimum amount of $5,269,693.46 within the meaning of section 93, Insurance Law.

3. The respondent failed to prove its own solvency at any time.

4. The respondent failed to repair capital impairment despite lawful demands made therefor by the petitioner pursuant to section 94, Insurance Law, and consequently is liable to rehabilitation on the grounds stated in that section and section 511(c) and (e) of the Insurance Law.

5. The petitioner is entitled to a judgment for the rehabilitation of the respondent upon the grounds stated in sections 93, 94 and 511(a), (c) and (e) of the Insurance Law, and it is further

ORDERED AND ADJUDGED that the respondent Citizens Casualty Company of New York be and it hereby is declared to be insolvent, and it is further

ORDERED AND ADJUDGED that the said Richard E. Stewart as Superintendent of Insurance of the State of New York, and his successors in office as Superintendents of Insurance of the State of New York, be and he is and they are hereby appointed rehabilitator of Citizens Casualty Company of New York, and are hereby authorized and directed forthwith to take possession of the property of the said Citizens Casualty Company of New York and conduct the business thereof and to take such steps toward the removal of the causes and conditions which made the within proceeding necessary as the Court shall direct and to deal with the property and business of Citizens Casualty Company of New York in the name of Citizens Casualty Company of New York or in the name of the Superintendent of Insurance, as rehabilitator of Citizens Casualty Company of New York, and it is further

ORDERED AND ADJUDGED that notice to all persons having claims against Citizens Casualty Company of New York to file or present the same with the rehabilitator, be and

the same hereby is deferred until further order of this Court, and it is further

ORDERED AND ADJUDGED that the title of the within proceeding be and the same is hereby amended to read as follows:

"In the Matter of the Application of

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and rehabilitate

CITIZENS CASUALTY COMPANY OF NEW YORK"

and it is further

ORDERED AND ADJUDGED that the said Citizens Casualty Company of New York, its officers, directors, depositories, trustees, agents, servants and employees and all other persons having any property or records belonging to the said Citizens Casualty Company of New York, be and they are hereby directed to assign, transfer, set over and deliver to said Superintendent of Insurance and his successors in office, as rehabilitator, all of such property or records in whosoever name the same may be and that any persons, firms, corporations or associations having any books, papers or records relating to the business of the said Citizens Casualty Company of New York, shall preserve the same and submit them to the Superintendent of Insurance, as rehabilitator, his agents, servants and employees for examination and copying at all reasonable times, and it is further

ORDERED AND ADJUDGED that the officers, directors, trustees, agents, servants and employees of the said Citizens Casualty Company of New York and all other persons other than the Superintendent of Insurance, as rehabilitator, be and they hereby are restrained from the further

transaction of business or from dealing with or disposing of the asset of the said corporation, and it is further

ORDERED AND ADJUDGED that the officers, directors, trustees, agents, servants and employees of the said Citizens Casualty Company of New York and all other persons be and they hereby are restrained from doing or causing to be done any act or thing which might waste the assets or allow or suffer the obtaining of preferences, judgments, attachments or other liens or the making of any levy against said corporation or its assets while in the possession or control of the Superintendent of Insurance, as rehabilitator, until the further order of this Court, and it is further

ORDERED AND ADJUDGED that the officers, directors, trustees, stockholders, servants, agents, employees and creditors of said Citizens Casualty Company of New York, and all other persons be and they are hereby enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its assets, or the Superintendent of Insurance, or from making and executing any levy upon the assets of the corporation, or from in any way interfering with the Superintendent of Insurance, as rehabilitator or his successors in office in his or their possession, control and management of the property of said corporation, or in the discharge of his or their duties, as rehabilitator, under the provisions of Article XVI of the Insurance Law of the State of New York, and it is further

ORDERED AND ADJUDGED that the Superintendent of Insurance, as rehabilitator, and his successors in office be and he is and they are hereby authorized, empowered and directed to conduct the business and affairs of the said Citizens Casualty Company of New York as he or they shall deem wise and expedient under and pursuant to the

direction of this Court and until the further order of this Court, and it is further

ORDERED AND ADJUDGED that the Superintendent of Insurance, as rehabilitator, or the respondent, may at any time make further application to this Court at the foot of this order for such further and different relief as may be appropriate, and it is further

ORDERED AND ADJUDGED that this judgment be entered in the office of the Clerk of the County of New York forthwith without costs and without disbursements.

Enter

B. R.
A.D.J.